Supreme Court, U.S.
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No. 99-1194

IN THE

SUPREME COURT OF THE UNITED STATES
October Term 1999

LEW WARDEN,

Petitioner,

v.

THE STATE BAR OF CALIFORNIA, et al,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Marie M. Moffat, S.B. #62167
Lawrence C. Yee, S.B. #84208
Colin P. Wong, S.B. #130033*
Office of General Counsel
State Bar of California
180 Howard Street
San Francisco, CA 94105
(415) 538-2200

Mark L. Tuft, S.B. #43146
Cooper, White & Cooper
201 California Street, 17th Floor
San Francisco, CA 94111
(415) 433-1900

James M. Wagstaffe, S.B. #95535
Kerr & Wagstaffe
100 Spear Street, 18th Floor
San Francisco, CA 94105
(415) 371-8500

*Counsel of Record

Attorneys for Respondents

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Respondents the State Bar of California, Lorna Maynard and Carole Rossi respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Supreme Court of the State of California's opinion in this case. That opinion is reported at Warden v. State Bar, 21 Cal.4th 628; 982 P.2d 154; 88 Cal.Rptr.2d 283 (1999).

I. INTRODUCTION

California has joined 39 other states in adopting a mandatory continuing legal education ("MCLE") program as a consumer protection measure requiring lawyers in active practice to maintain certain minimum levels of continuing education. Petitioner Lew Warden seeks to invalidate California's entire MCLE program based on various constitutional challenges--principally that the narrow exemptions, which are applicable to only a fraction of the 123,000 practicing attorneys in California, violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution. Petitioner also claims, without benefit of

authority, that the right to practice law, once granted by a state, is a fundamental right protected by the Privileges and Immunities Clause, the Equal Protection Clause and the Due Process Clause, that the nondiscretionary act by the California State Bar of placing petitioner on inactive status until petitioner complied with the MCLE program requirements violates the Due Process Clause and that placing petitioner on inactive status for failure to obtain 12 hours of educational credits in a 12-month period violates the Equal Protection Clause, the Due Process Clause of the Fourteenth Amendment and the Excessive Fines and Cruel and Unusual Punishment Clauses of the Eighth Amendment.

As demonstrated below, the applicable equal protection standard in reviewing classifications that are challenged in this context is the "rational relationship" standard not the "strict scrutiny" standard advanced by petitioner. The "rational relationship" standard was properly applied by the California Supreme Court in petitioner's case -- consistent with the

governing decisions of both this Court and California. The California Court's decision does not conflict with the decisions of this Court either on the proper standard to be applied or the application of that standard in this case. In light of the California Supreme Court's proper determination of the issues in petitioner's case, there is no basis for granting petitioner's Writ of Certiorari.

II. STATEMENT OF THE CASE

The California legislature enacted Business & Professions Code Section 6070 in 1989 which required the California State Bar ("State Bar") to request the California Supreme Court to adopt a rule of court authorizing the State Bar to establish and administer an MCLE program. The statute directed the State Bar to include certain details in its request for the rule, including a provision that a member of the State Bar who failed to satisfy the MCLE requirements would be placed on inactive status and thus be unable to practice law in California until the requirements were met. The legislature

provided in section 6070(c)[1] that retired judges, officers and elected officials of the State of California, full-time professors at law schools accredited by the State Bar of California, The American Bar Association, or both, and full-time employees of the State of California, acting within the scope of their employment, shall be exempt from the requirements of the statute. (Pet's. App. G, pp. 134-135.)

Pursuant to the legislation, and after two public hearings, the State Bar filed with the California Supreme Court a request for a new rule of court authorizing the State Bar to establish a mandatory continuing education program. On December 6, 1990, the California Supreme Court amended its rules to add Rule 958 establishing the MCLE program. Rule 958 required the State Bar to administer an MCLE program ensuring that each member, not exempt, complete 36 hours of legal study within a 36-month period designated by the State

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[1]Unless otherwise indicated, all statutory references are to the California Business & Professions Code.

Bar. In addition to adopting the exemptions in Section 6070(c), the California Supreme Court added an exemption for full-time federal employees acting within the scope of their employment. (Pet's. App. G, p. 135.)

Following adoption of Rule 958, the State Bar adopted a set of rules and regulations governing the operation of the MCLE program. The regulations included the five exempted categories pursuant to Section 6070 and Rule 958 and included an additional provision– entitled "Good Cause Exemption From or Modification of Requirement"– that authorizes any member of the State Bar to "submit an application setting forth good cause for an exemption from compliance with or modification of any of the [MCLE] requirements, including an extension of time for compliance, in accordance with a procedure to be established by the Committee on Minimum Legal Education. (Pet's. App. G, pp. 135-136.)[2]

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[2]Following the State Bar's adoption of the MCLE rules and (continued...)

California's MCLE program applies generally to all active members of the State Bar. The State Bar's official records[3] show that of the total number of exemptions granted to active members in the period 1994-1996 (based on the sum of year-end figures), only 144 (.14%) members were exempted as retired judges, 48 (.05%) as elected officers of the State, and 376 (.4%) as professors of accredited law schools. (Resp's. App. 4, pp. 86-89) [4]

Petitioner was an active member of the California State Bar in 1993 and vowed never to take any MCLE courses.

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[2](...continued)
regulations, the California State Bar Committee on Minimum Continuing Legal Education adopted a set of guidelines for its advisory interpretations of the MCLE rules and regulations.

[3]Pursuant to California Rules of Court, Rule 950.5, the State Bar maintains the official membership Roll of Attorneys for the California Supreme Court.

[4]The largest number of exemptions were for those in the categories of federal or state employees–2,477 (2.3%) and 1,611 (1.5%) respectively–two categories that have not been seriously challenged.

(Resp's. App. 4, p. 83.) Under the MCLE statute and rules, petitioner was obligated to complete 12 hours of credit between February 1992 and January 31, 1993 which petitioner acknowledged he did not do. Nor has petitioner applied for a "Good Cause Exemption" or a modification of any of the requirements imposed by the MCLE rules and regulations. On April 23, 1993, the State Bar sent petitioner a "Non-Compliance Notice," pursuant to its regulations, advising petitioner of what he was required to do to comply with the MCLE requirements and informing him that he had 60 days from the date of notification to comply with the required number of educational hours (12) or he would be enrolled as an inactive member of the California State Bar effective July 19, 1993. (Resp's. App. 3, p. 75.)[5] On July 9, 1993, petitioner

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[5]It is within petitioner's unilateral power to be reinstated administratively to active practice simply by completing the required hours of MCLE study, so certifying and paying delinquent fees. (Pet's. App. G.) A certain number of the required educational hours can be attained by self-study

(continued...)

wrote to the MCLE Compliance Coordinator of the State Bar, asserting that the MCLE program is unconstitutional and that he could not be prohibited from practicing law for refusing to comply with its requirements. On July 29, 1993 the State Bar sent petitioner a final notice advising him that his name would be submitted to the Board of Governors on July 17, 1993 with recommendation that effective July 19, 1993 he be enrolled as an inactive member of the Bar until he complied with the MCLE requirements. (Resp's. App. 3, pp. 78-79.) On July 30, 1993, the California State Bar sent petitioner a notice of enrollment on administrative inactive status, informing him that effective July 19, 1993 he was ineligible to practice law in California until the State Bar received proof of his compliance with the applicable MCLE requirements. On September 23, 1993, petitioner responded to the State Bar's July 30, 1993 notice expressing his profound disagreement with the MCLE

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[5](...continued)
courses. (Pet's. App. G, p. 133.)

program and threatening to sue the State Bar and its employees for damages if it did not "forthwith recall [its] suspension order."

On October 7, 1993, petitioner filed with the State Bar a "claim of damage," which after a review by the State Bar Board of Governors, was denied. Petitioner then filed a lawsuit in Alameda County Superior Court against the State Bar and certain of its employees seeking compensatory and punitive damages, declaratory relief, injunction, and mandate. (Pet's. App. H, p. 149.) In his complaint, petitioner claimed that the MCLE program was unconstitutional in numerous respects, asserting that the program denied him procedural and substantive due process of law and equal protection of the law. Among his other claims, petitioner alleged that the State Bar violated his rights to procedural due process and caused him to suffer damages even though he had received regular correspondence prior to his required compliance. Petitioner further alleged that Section 6070 and Rule 958 deprived him of

equal protection because of the program's allegedly discriminatory classifications and that the exemptions subjected him to differential treatment prohibited by the State and Federal Constitutions. (Pet's App. H.)[6]

The trial court granted summary adjudication in favor of the State Bar on all issues submitted by the Bar, thus effectively disposing of all aspects of petitioner's constitutional challenge. Petitioner appealed to the California Court of Appeal. The Court of Appeal focused almost entirely on petitioner's equal protection claim, in particular the claim that the MCLE program denied petitioner equal protection under the law because the program unjustifiably exempted certain categories of attorneys

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[6]Petitioner did not raise at any time in the State court proceedings his contention that his enrollment to inactive status violated his rights under the 8th Amendment. Thus, it would be proper for this Court to decline review of this issue. See Gupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc. 119 S.Ct. 1961 (1999). In addition, there is no merit to petitioner's claim that his being placed on inactive status is violative of the 8th Amendment. Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc., 109 S.Ct. 2909 (1989).

from the MCLE requirements that applied to petitioner and to other non-exempt attorneys. The Court of Appeal rejected petitioner's contention that his equal protection challenge should be evaluated under the "strict scrutiny" test. However, the Court of Appeal concluded under the "rational basis" standard of review that, while full-time state and federal employees who did not represent individual clients satisfied the rational relationship test, the exemptions for retired judges, officers and elected officials of the State of California and full-time professors at accredited law schools did not. Two of the three Court of Appeal justices concluded that the appropriate remedy was to invalidate the MCLE program as a whole, leaving the California legislature "to start anew and initiate comprehensive legislative reform of MCLE, rather than to accept a judicial reformation of Section 6070." The remaining justice, concluded that there was no need to "throw [] the baby out with the proverbial bath water" and suggested that the more appropriate solution was to excise the exemptions, which the justice

observed apparently applied to only a few hundred lawyers, rather than to invalidate the MCLE program as a whole. (Pet's App. B, p. 114.)

Petitioner and the State Bar filed separate petitions for review with the California Supreme Court. The California Supreme Court accepted for review the State Bar's petition which presented two principal issues: (1) whether the MCLE program violated federal or state equal protection principles by exempting certain categories of attorneys from the MCLE requirements, and (2) if so, what the appropriate remedy should be.

On August 26, 1999, the California Supreme Court issued its decision reversing the Court of Appeal's decision and concluded that the challenged exemptions were not unconstitutional under a proper application of the "rational relationship" standard. (Pet's App. A.) The California Supreme Court agreed with the Court of Appeal that the applicable equal protection standard of review in this context is

the "rational relationship" rather than the "strict scrutiny" standard but held that the Court of Appeal had erred in its application of the "rational relationship" standard in conducting its judicial review of the statute. The California Supreme Court also concluded that petitioner's procedural due process challenges lacked merit and that the trial court had properly rejected those claims. (Pet's App. A, p. 17, fn. 6), The California Court found that petitioner had been provided with ample notice of his noncompliance with the existing MCLE requirements, and since petitioner did not claim that he had complied with or was exempt from those requirements and there were no other factual questions to be resolved by a hearing, the State Bar's nondiscretionary administerial action of placing petitioner on inactive status without a hearing did not, under such circumstances, deny petitioner procedural due process. On September 9, 1999, petitioner filed a petition for rehearing which was denied by the California Supreme Court on October 20, 1999. Petitioner filed the instant Petition for Writ

of Certiorari with this Court on January 18, 2000.

III. ARGUMENT

A. There Is No Genuine Dispute or Conflict That the Traditional "Rational Relationship" Standard Governs Petitioner's Equal Protection Clause Challenge to California's MCLE Program.

The California courts that have considered petitioner's equal protection challenge to the MCLE program have agreed that petitioner's claims must be evaluated under the traditional "rational relationship" standard rather than the heightened "strict scrutiny" standard applicable in cases involving "suspect classifications" or "fundamental interests." There is no authority that would support petitioner's principal argument that the right to engage in the practice of law is a "fundamental" right or liberty for equal protection purposes, and that statutes or court rules that create classifications relating to the practice of law are therefore subject to the heightened "strict scrutiny" standard of judicial review. Governing decisions of this Court have made it clear that the rational relationship standard applies

to classifications involving those persons who already have obtained professional or occupational licenses, as well as to those applying for such licenses. See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483, 488-489 (1995); Semler v. Dental Examiners, 294 U.S. 608, 610-611 (1935). California case law is consistent with these authorities. See, Bib'le v. Committee of Bar Examiners, 26 Cal.3d 548 (1980) (the conventional "rational relationship" test applied in an equal protection challenge to a State Bar rule that accorded differential treatment to bar applicants on the basis of whether they attended accredited or unaccredited law schools); Hernandez v. Dept. of Motor Vehicles, 30 Cal.3d 70, 81 (1981); Hughes v. Board of Architectural Examiners, 17 Cal.4th 763, 789 (1998); Wachs v. Curry, 13 Cal.App.4th 616, 624 (1993).

Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985), is not to the contrary. In Piper, this Court invalidated a rule against practice by out-of-state attorneys because it violated a fundamental right under the "Privileges and

Immunity Clause." Piper, supra, 470 U.S. at 284-88. Petitioner's reliance on Saenz v. Roe, 526 U.S. 489, 119 S.Ct. 1519 (!999) is also misplaced. Saenz v. Roe, supra, as with many of the cases cited by petitioner, did not involve equal protection challenges but rather raised challenges under the privileges and immunities clause and involved the constitutional right to travel. The present petition raises no such issues as they may relate to out-of-state attorneys.

Nor is there a conflict among the federal courts that the highly deferential "rational relationship" test governs the equal protection challenges raised by petitioner with respect to California's MCLE program. See, Lupert v. California State Bar, 761 F2d 1325, 1327 (9th Cir. 1985) (discrimination based on whether law student attends accredited or unaccredited law school does not infringe upon fundamental right), cert. denied, 474 U.S. 916 (1985); Edelstein v. Wilentz, 812 F.2d 128, 132 (3rd Cir. 1987) (no fundamental right to practice law); Verner v. State of Colorado, 533 F.Supp. 1109, 1118 (D. Colo. 1982)

aff'd, 716 F.2d 1352, 1353 (10th Cir. 1983) (applying the rational relationship standard in determining validity of exemption from state MCLE program).

Therefore, petitioner's attempt to avoid rational basis analysis by arguing that the right to practice law is a "fundamental" right giving rise to a strict scrutiny analysis for purposes of equal protection is contrary to established law.

B. The California Supreme Court's Application Of The Equal Protection Standard In Determining The Validity Of California's MCLE Program Is Consistent With Well Established Holdings Of This Court And Presents No Conflict Of Decisions And No Important Undecided Question.

The California Supreme Court followed the governing principles explained by this Court on more than one occasion that "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for

the classification. [Citations]" FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993). Petitioner argues without authority that the proper focus should be on the supposed "actual" basis for the MCLE statute and rules rather than on the well-established "any conceivable basis" standard. However, as this Court has explained "On rational basis review, legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." FCC v. Beach Communications, Inc., supra, 508 U.S. at 515; Vance v. Bradley, 440 U.S. 93, 111 (1979). Where there is any conceivable justifications for statutory line-drawing, "it is, of course, constitutionally irrelevant whether the reasoning in fact underlay the legislative decision." United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 179 (1980).

As noted previously, Supreme Court of New Hampshire v. Piper, supra, 470 U.S. 274, relied on most heavily by petitioner, raised an attack on a fundamental constitutional right

relating to interstate travel and embodied an attack not under equal protection but under the privileges and immunities clause.

The California Supreme Court correctly concluded that California's MCLE program that generally requires attorneys licensed by the state to complete a specified number of continuing education courses did not violate the federal equal protection clause by exempting retired judges, state officers, and elected officials and full-time professors at accredited law schools. There can be no legitimate dispute that California's MCLE program serves a legitimate state purpose–protection of the public by insuring that lawyers continue to be fit and qualified to practice law. Lupert v. California State Bar, supra, 761 F.2d at 1327-38; Verner v. State of Colorado, supra, 533 F.Supp. at 1118. The MCLE requirements are intended to focus in the first instance on those attorneys who are most likely to engage in representing clients in private practice. The categories of exemptions therefore have in common the fact that as discreet groups the exempted attorneys are less likely to

engage in private practice or handle client funds than other attorneys. The California legislature in attempting to improve the overall competence of attorneys is not required to address the entire problem at once, but is allowed to address the problem one step at a time. Moreover, the legislature may apply the requirement only to groups of lawyers it thought most generally pertinent to its objective. Vance v. Bradley, supra, 440 U.S. at 109.

Petitioner argues that the limited exceptions to the MCLE program renders the entire program "underinclusive" in violation of equal protection. However, mathematical nicety with respect to regulatory line-drawing is not required under the rational relationship standard. FCC v. Beach Communication, Inc., supra, 508 U.S. at 315-16. Nor does the equal protection clause prohibit a state legislature from attacking a problem piece meal, "addressing itself to the phase of the problem which seems most acute to the legislative mind." Williamson v. Lee Optical Co., supra, 348 U.S. at 489; City of New Orleans v.

Dukes, 427 U.S. 297 (1976) (imposing restrictions on opticians but not optometrists or ophthalmologists); Railway Express Agency v. New York, 336 U.S. 106, 69 S.Ct. 463 (1949) (prohibiting advertising on all vehicles except vehicles carrying on business of owner).

Applying the rational relationship standard the Court properly concluded that there are at least two conceivable justifications that reasonably support the narrow exemptions to MCLE. The Court found it logical and not irrational that law professors, retired judges and legislators generally are less likely as a group to represent clients on a full or part-time basis–thus, rendering MCLE of a less serious need than for all other attorneys.[7] The Court also found that it was reasonable and not irrational to conclude that the exempted classes may be better trained and experienced as a group and thus in less need of

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[7]Although the California Supreme Court did not address the extremely limited total number of exemptions claimed in each of the categories, they are so di-minimus as to nullify petitioner's equal protection challenge to the MCLE program.

MCLE. The exemptions are therefore rationally related to the consumer protection purpose of the MCLE program in so far as they identify categories of attorneys who, as compared to other categories of attorneys, may not pose as serious a risk to consumers even if these narrow categories of attorneys are not subject to the same CLE requirements.

As this Court has clearly stated, the equal protection guaranty does not require or authorize a court to invalidate such a consumer protection measure simply because the program does not go as far as it might in protecting consumers. See, e. g. Railway Express v. New York, supra, 336 U.S. at 110, "It is no requirement of equal protection that all evils of the same genus be eradicated or not at all."); McDonald v. Board of Election Commissioners, 394 U.S. 802, 809 (1969) ("[A] legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.") The governing authorities of this Court

establish that under the rational relationship standard, a court may not strike down a classification simply because the classification may be imperfect. See, e.g., Dandridge v. Williams, 397 U.S. 471, 485 (1970) or because it may be "to some extent both under inclusive and over inclusive." Vance v. Bradley, supra, 440 U.S. at 108.

The California Supreme Court therefore properly applied the rational basis analysis in accordance with the principles enunciated in FCC v. Beach Communications, supra and did not do so to any "unreasonable extreme." In applying the rational basis test, the Court is not obligated, nor is it permitted to determine the validity of a legislative act on the subjective motivations of a particular drafter. Petitioner focuses his attack on the "improper" motives of the legislature in crafting one or more of the exemptions. Petitioner's argument as to what he perceives to be the true of political purposes for the exemptions not only lacks relevance but finds no support in

the record. [8]

C. The California Supreme Court Was Correct in Concluding That Petitioner's Substantive and Procedural Due Process Claims Lacked Merit.

Petitioner argues that his due process rights were violated because the MCLE Regulations make no provision for a hearing before a State Bar member's license to practice law can be suspended.[9] (Pet. pp. 28-29.) However, appellant was not entitled to a hearing prior to his transfer to administrative inactive status due to his deliberate refusal to comply with the

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[8] Petitioner improperly relies on a hearsay statement supposedly reported to an aid to the governor for its attack on the exemption for legislators. Petitioner cites no evidentiary support regarding the other exemptions. Nor does petitioner explain the California Court's independent adoption of Rule 958.

[9] Warden was not suspended but placed on administrative inactive status. The distinction is important since a member who has been placed on suspension must wait until his or her suspension has been completed. On the other hand a member who is placed on administrative inactive status can return to active status immediately upon completing the MCLE requirements and attesting that he or she has done so. (MCLE Regulations, § 15.1.)

MCLE requirements. This Court's opinion in Codd v. Velger 429 U.S. 624; 97 S.Ct. 882; 51 L.Ed.2d 92 (1977), is clear in stating that a hearing is not required where there are no issues of fact to be resolved.

In this case, the record clearly reflects that appellant was given notice and an opportunity to respond and show that he had in fact fulfilled the MCLE requirements. In response, he deliberately indicated his refusal to comply and indeed vowed he would never attend an MCLE lecture. (Resp's App. 3, p. 83.)

As this Court explained in Texaco, Inc. v. Short, 454 U.S. 516, 70 L.Ed.2d 738, 102 S. Ct. 781 (1982), there is no impermissible legislative limitation of procedural protections in a statute that provides a self-executing lapse of a property interest upon the owner's failure to perform a reasonable condition that indicates a present intention not to retain the interest. Thus, where no factual determination is necessary and no discretion is to be exercised, no process is due because the

owner of the property, not the state, terminates the interest through inaction.[10]

Furthermore, the California Supreme Court properly concluded that petitioner's substantive due process rights were not violated. As stated *infra*, there is no fundamental right being infringed by the current MCLE legislation. This Court has indicated that the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment, but a right which is nevertheless subject to reasonable

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[10]Petitioner's petition also appears to suggest that he was improperly denied an opportunity to challenge, before the State Bar, the constitutionality of the MCLE program. California Constitution Article III, section 3.5(a) precludes an administrative agency from declaring a statute unconstitutional. However, there is no denial of due process where the constitutional challenge may be asserted upon a petition for judical review of the agency's action. Dash Inc. v. Alcoholic Bev. Control App. Bd. 683 F.2d 1229 (9th Cir. 1982.) Accordingly, even if appellant was given a hearing the only issue would be whether or not he had complied and from his own admission he had not. Therefore, a hearing would not have prevented him from being placed on administrative inactive status.

government regulation. Conn v. Gabbert 119 S.Ct 1292, 1295-1296; 526 U.S. 286; 143 L.Ed.2d 399 (1999). California's MCLE is a reasonable means of insuring that lawyers continue to be fit and qualified to practice law. (See Verner v. State of Colo. supra, 716 F.2d 1352, ["[A] state can require an attorney to take reasonable steps to maintain a suitable level of competency, so long as such requirements have a 'rational connection with the [attorney's] fitness to or capacity to practice law.' [Citations.] We cannot say that the CLE requirements in Colorado have no rational connection to a lawyer's suitability to practice law.")

The California Court's decision on this issue does not conflict with the decisions of this Court either on the proper standard to be applied or the application of that standard in this case.

IV. CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Dated: February 17, 2000

Respectfully submitted,

Marie M. Moffat
Lawrence C. Yee
Colin P. Wong

Cooper, White & Cooper
Mark L. Tuft

Kerr & Wagstaffe
James M. Wagstaffe

By: _____
Colin P. Wong

Attorneys for Respondents The State Bar of California, Lorna Maynard and Carole Rossi